FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation,
COUNTRY CLUB ESTATES, a partnership, and
BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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I. INTRODUCTION

The issues before the Court are in essence only two questions: Whether the Tahoe Regional Planning Agency ("TRPA") is immune from suit under the Eleventh Amendment, and whether the members of TRPA's governing body ("the individual defendants") are entitled to the *absolute* legislative immunity of Congressmen and state legislators. Petitioners'[1] opening brief showed that the answer to each is no. The briefs of the respondents have not overcome that showing. Indeed, the States of California and Nevada now

1. For convenience's sake, all three petitioners will be referred to collectively as "Lake Country."

agree that TRPA does not partake of their Eleventh Amendment immunity, for it is not an arm of either state, but only a political subdivision. (See Part A below.) The individual defendants have been unable to show that their own immunity should be absolute, rather than the qualified immunity afforded other administrative officials. (See Parts B and C below.)

Trying to skirt these conclusions, TRPA and some of the individual defendants have improperly attempted to expand the scope of review beyond the immunity questions comprised in the questions presented by arguing that the Ninth Circuit erred in ruling that Lake Country has a claim for damages to assert. Respondents have filed no cross-petition, and that issue is not before the Court. (See Part D below.) Even if those arguments were properly before the Court, however, they are wrong. First, the Ninth Circuit was correct in holding a damage remedy available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (See Part E below.) Furthermore, Lake Country is entitled to a damage remedy under 42 U.S.C. § 1983. (See Part F below.)

The decision of the Ninth Circuit Court of Appeals should be reversed on the immunity issues presented by the petition for certiorari and the case should be remanded for proceedings against TRPA and the individual defendants on Lake Country's claims against them.

II. ARGUMENT

A. The Tahoe Regional Planning Agency Is Not Entitled to Eleventh Amendment Immunity.

Little need be said concerning TRPA's argument that it is entitled to the Eleventh Amendment immunity of California and Nevada. [Brief of Certain Respondents, pp. 40 et seq.] California and Nevada both agree with Lake Country that TRPA is not an arm of either state and does not share their immunity. [Brief for Respondent State of Nevada, pp. 3-7; Brief of Respondent State of California, pp. 517.] The states' position, while possibly not determinative, is certainly entitled to considerable weight. It is also consistent with the terms of the Compact and the applicable authorities. TRPA's contrary contention that all compact agencies have Eleventh Amendment immunity is utterly without supporting authority and, indeed, is contrary to every reported decision on the subject except the one brought here for review. Since the Eleventh Amendment issues presented by that decision have been fully dealt with in Lake Country's opening brief and its petition for certiorari, no more will be said about them here.

B. The Members of the Tahoe Regional Planning Agency's Governing Body Are Not Entitled to Absolute Immunity.

The arguments of the individual defendants in large part misconceive the issue to be decided here. No one questions that the members of TRPA's governing body are entitled to a form of official immunity. The question here is whether they are entitled to the absolute immunity of state and federal legislators. The individual defendants' arguments, rather than addressing this question, firmly and superfluously establish the need for some form of immunity for all government officials vested with discretion. Nowhere, however, do they show that the case of these appointed administrative officials presents one of "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz v. Economou*, — U.S. —, 98 S.Ct. 2894, 2911 (1978).

The individual defendants first contend that the absolute immunity of state and federal legislators is derived from common law rather than the speech and debate clause of the

Constitution, art. I, § 6, and that the members of TRPA's governing body share that immunity because they too are "legislators." [Brief of Certain Respondents, pp. 28-30; Brief for Respondents James Henry and William Briner, pp. 6-10.] It is true that absolute legislative immunity predates the Constitution and can be traced back in the common law tradition as far as the English Bill of Rights of 1689. However, this common law immunity was codified, as it were, in the speech and debate clauses of the federal and state constitutions. *Tenney v. Brandhove,* 341 U.S. 367, 372-75 (1951). As a result, this Court has repeatedly acknowledged that "the doctrine of legislative immunity [has] . . . its roots in the Speech or Debate Clause of the Constitution. . . ." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1966); see *Scheuer v. Rhodes,* 416 U.S. 232, 240-41 (1974).[2]

The terms of the speech and debate clause, as well as those of the Bill of Rights of 1689 and those of the early state constitutions canvassed by Justice Frankfurter in *Tenney v. Brandhove,* 341 U.S. 367, 372-75 (1951), are powerful indicators of the scope of the common law privilege they embody.[3] All speak in terms of protection, not of

2. "In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session. [Citations omitted] This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original Colonies. Immunity for the other two branches—long a creature of the common law—remained committed to the common law." [Citations and footnote omitted.]

3. TRPA and most of the individual defendants contend that the states' speech and debate clauses cannot be the source of their legislators' absolute immunity because it would be "monstrous" to permit the states to immunize their legislators from liability for deprivations of paramount federal rights. As they correctly note, however, these state constitutional provisions did not create legislative immunity but instead, like the federal constitution, only preserved a preexisting common law immunity. It is, moreover, incongruous for defendants to characterize as "monstrous" the immunization of state legislators from liability for constitutional torts on the basis of these explicit provisions of state constitutions while staunchly defending the ostensible immunization of the defendants in this case from the same liability for unconstitutional action on the basis of a flimsy and superficial analogy to state legislators' immunity.

members of any rulemaking body, but only of members of the highest such bodies—Parliament, the houses of Congress, and the houses of the state legislatures. There is no indication that the common law reflected by these constitutional provisions extended the absolute immunity of the highest lawmakers to subordinate rulemaking officials. On the contrary, the protected status of Congressmen and state legislators is unique. This Court long ago held as much when it said of the defendant Congressmen's conduct in *Kilbourn v. Thompson,* 103 U.S. 168, 201 (1881), "If they had done this in any ordinary tribunal . . . they would have been liable for the action which they had thus promoted. [¶] The House of Representatives is not an ordinary tribunal."

Even if the source of absolute legislative immunity were common law independent of the speech and debate clause, common law denies absolute protection to these defendants. As Lake Country mentioned in its opening brief, the Ninth Circuit's extension of absolute immunity to subordinate "legislative" officials in this case is in conflict with decisions in five other circuits denying them that absolute protection. [See Brief for the Petitioners, pp. 33-34.] Defendants, though perfunctorily asserting that their immunity is controlled by the common law, have failed to deal with it. In all their extended discussion of the issue they cite only one federal opinion, a district court case decided long prior to this Court's landmark decisions of the last decade, to sup-

port their claim of absolute immunity.[4] [Brief for Respondents James Henry and William Briner, p. 7.]

Defendants have also failed to show that TRPA's governing body is comparable to Congress and state legislatures in any pertinent sense. As Lake Country showed in its opening brief, for example, its members are not subject to anything like the self-disciplinary powers of those bodies and are not subject to restraint by the electorate. As this Court explained in the judicial context, *Butz v. Economou*, 98 S. Ct. at 2914, such institutional safeguards against abuse of official power are important in determining whether the private damage remedy as an alternative restraint is to be absolutely barred.

The remaining arguments the individual defendants make serve largely to prove that all government officials who are required to exercise discretion in fashioning and administering policy require some sort of immunity. Indeed their arguments show that the appropriate immunity in this case is one that is qualified, not absolute.

Defendants argue, for example, that one principle underlying absolute immunity for legislators is that of separation of powers, reflected in judicial deference to legislative judgments. [Brief of Certain Respondents, p. 31.] Similar deference, however, is extended to exercise of discretion by officials within the executive branch (see generally, 4 Davis, Administrative Law Treatise, §§ 28.04 and 28.08 (1958 and 1970 supp.)) and it is quite clear that their immunity is generally only qualified. *E.g., Butz v. Economou*, — U.S. —, 98 S. Ct. 2894 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). But more important, judicial deference to

4. Defendants Briner and Henry also quote in support, in edited fashion, the first sentence of 4 McQuillin on Municipal Corporations § 12.222 (3d Ed. 1968) holding municipal lawmakers free of liability for ordinances they enact. The remaining portion of that section makes it quite clear that the immunity described is qualified, not absolute.

decisions of the legislative and executive branches does not extend to actions that exceed their authority under the specific prohibitions of the Constitution, as alleged in this case. The federal courts have consistently reviewed and have indeed been the final authority on the constitutional validity of acts of other branches ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803).[5] Most significant, however, the deference accorded to determinations made by subordinate "legislative" bodies such as TRPA's governing body is considerably less than that shown to those made by state legislatures. In California, for example, the Supreme Court long ago rejected a contention that a "legislative" determination of a city council was as binding on the court as that of the co-equal legislative body, stating:

> "We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government, and beyond judicial control." *Spring Valley Water Works v. City and County of San Francisco*, 82 Cal. 286, 309, 22 P. 910 (1890).

It quoted with approval from *Davis v. Mayor of New York*, 1 Duer 451, 495 (Super. Ct.), affirmed in *People v. Sturtevant*, 9 N.Y. 263 (1853), saying:

5. Defendants' argument that it is inconsistent with judicial deference to legislative judgments to "mulct legislators in damages should the Court disagree with the legislative judgment" (Brief of Certain Respondents, p. 32) disregards both the constitutional limits on judicial deference and the availability of qualified immunity. Under the standards of qualified immunity laid out by this Court, subordinate "legislators" will be "mulcted in damages" only if they have not only actually violated a constitutional right but have done so maliciously or in callous disregard of established rights, not just because a court disagrees with their judgment.

> "The doctrine, [of judicial deference to legislative determinations of fact], . . . may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government representing and exercising in its sphere the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true when applied to a subordinate municipal body, which although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial."

Accord: American Distilling Co. v. City Council of Sausalito, 34 Cal. 2d 660, 664, 213 P.2d 704 (1950); *San Christina Investment Co. v. City and County of San Francisco*, 167 Cal. 762, 770, 141 P. 384 (1914). For similar reasons, the members of these subordinate bodies do not share state legislators' absolute immunity from suit.[6]

Defendants' argument that absolute immunity is required because courts eschew inquiry into "legislative" motives also misses the point. [Brief of Certain Respondents, p. 32.] There is a similar restriction on inquiry into the mental state of executive officers for the purpose of invalidating their decisions, *United States v. Morgan*, 313 U.S. 409, 422 (1941), yet this court has sanctioned only a qualified immunity for the Secretary of Agriculture, the very officer involved in that case. *Butz v. Economou*, — U.S. —, 98

6. Defendants Briner's and Henry's citation of cases in which courts have refused prospectively to enjoin subordinate "legislative" acts on separation of powers grounds are inapplicable in this case, where what is sought is a remedy for completed "legislative" action. Virtually every case they cite carefully preserves the availability of a remedy after the fact.

S. Ct. 2894 (1978). It is one thing to say, as defendants' cited authorities do, that courts will avoid inquiry into legislative (or executive) motive *for the purpose of invalidating the laws enacted.* It is altogether different to say, as defendants do, that if a law violates constitutional rights, as it is alleged to do here, courts will not look to the motives of those who enacted it for the purpose of fixing liability for the harm done. As this Court has observed in limiting executive officers to a qualified immunity, an action for damages is an important means of vindicating constitutional rights that should not be thwarted by absolute immunity in the absence of compelling reasons to do so. *Butz v. Economou*, 98 S. Ct. 2894, 2910 (1978); see *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974).

Nor is it any objection that the motives of TRPA's "legislators" for their passage of an ordinance may well be diverse. [See Brief of Certain Respondents, pp. 33-34.] The same could have been said, of course, of the motives of members of the school board in *Wood v. Strickland*, 420 U.S. 308 (1975), yet this Court found a qualified immunity appropriate there. Similarly unpersuasive is the great difficulty defendants see in deciding who is to be held liable if some of them acted maliciously, for example, while others merely erred. There is no difficulty at all if those whose state of mind entitles them to qualified immunity are protected while those who acted with impermissible states of mind are not. Distinctions based on the actor's state of mind, both subjectively and objectively determined, are common ones in many fields of law. Such an individualized application of qualified immunity serves both to com-

pensate the victim and to deter abuse of official power, while at the same time fully protecting officials who act reasonably and in good faith.

Finally, defendants' general arguments about the difficulty TRPA's members face in the context of conflicting pressures concerning the future of Lake Tahoe serves only to show that they need some immunity, not that they need absolute immunity. [Brief of Certain Respondents, pp. 34-36; Brief for Respondents James Henry and William Briner, pp. 9-13.] It can scarcely be supposed that Governor Rhodes was faced with less difficult decisions or any less intense conflicting pressures when he called out the National Guard at Kent State (with considerably less time for cool reflection than these defendants have had), yet his immunity was limited to acts taken reasonably under the circumstances and in good faith. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The same should be true here.

C. The Damage Claims Cannot Be Dismissed on the Basis of Defendants' Qualified Immunity.

Defendants also argue that the damage claims in Lake Country's complaint should be dismissed on the basis of their qualified immunity. (Brief of Certain Respondents, pp. 37-39; Brief for Respondents James Henry and William Briner, pp. 13-15.) They contend that because their action was not in violation of "clearly established constitutional rights," their qualified immunity provides a complete defense to Lake Country's damage claims.

Qualified immunity is not available as a defense if the defendant official

> "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, *or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]*." *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (emphasis supplied).

Defendants have totally ignored the portion of this formulation that conditions the availability of immunity on subjective good faith. Lake Country alleged in its complaint that defendants acted with the intention of taking its property in violation of its constitutional rights.[7] On a motion to dismiss, these allegations are taken to be true, *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); 2A Moore's Federal Practice § 12.08 (2d Ed. 1972), and the complaint cannot be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of the claim that would entitle them to relief. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[8] As in *Scheuer v. Rhodes*, the complaint places in issue the subjective good faith of defendants. The damage claims therefore could not be dismissed even if defendants were

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7. The complaint alleges among other things, that respondents intentionally destroyed all value and use of the property in order to take the property for public uses without instituting condemnation proceedings and without paying Lake Country just compensation for the property. TRPA is also alleged to have announced its intention to acquire Lake Country's property, and intentionally failed even to give timely or proper consideration to Lake Country's applications. [First Amended Complaint ¶¶ 23, 40; A. 9-10, 14]

8. Defendants have likewise ignored these principles applicable to a motion to dismiss by including in their version of the facts statements that amount to contentions that Lake Country has failed to exhaust administrative remedies. That apparent contention has not been passed on by either court below and there will be ample time for defendants to raise it in their answer. On the face of the complaint, however, it is not a consideration, for the complaint plainly alleges that exhaustion would be futile in these circumstances. [First Amended Complaint, ¶¶ 23, 40; A. 10, 14.]

correct in urging that no established constitutional right had been violated.[9]

Defendants are also wrong, however, in contending that they cannot be held liable because the rights Lake Country claims they violated are not clearly established. It can scarcely be said at this late date that the existence of rights of due process and just compensation guaranteed by the Fifth and Fourteenth Amendments are doubtful. If anything were unclear in this case, it would not be the existence of those rights, but only the point at which regulations in the exercise of the police power amount to violations of those rights. *Penn Central Transportation Co. v. City of New York*, — U.S. —, 98 S. Ct. 2646, 2659 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). That the exact contours of these constitutional rights have not been fixed for every case in the context of land use regulation is a far cry from saying that there is doubt about whether they exist.

This Court's decision in *Procunier v. Navarette*, 434 U.S. 555 (1978), on which respondents heavily rely, suggests nothing to the contrary. In that case summary judgment for defendants was affirmed where, at the time of the alleged violation, under pertinent decisions "there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972." 434 U.S. at 565. No decision at that time dealt with a prisoner's right under the First Amendment to send mail and the defendants therefore "could not reasonably have been expected to be aware of a constitutional right that had not been declared." 434 U.S. at 565.

It could hardly be said, however, that in this case there was any doubt that the due process and just compensation

9. Compare *Procunier v. Navarette*, 434 U.S. 555 (1978), where summary judgment for defendants was affirmed where there was no issue of intentional, but only of negligent violation of constitutional rights.

clauses of the Fifth and Fourteenth Amendments were restraints on the enactment of land use regulations at the time of the respondents' actions. Indeed, the allegations of the complaint, which are all that is now before the Court, are that all beneficial use and all economic value of Lake Country's property has been destroyed. [First Amended Complaint, ¶¶ 20, 22, 26, 27, 37, 39, 43; A. 9, 11, 13, 14, 15.] This is no doubtful case, but the clearest and most extreme case. It is apparent from this Court's prior decisions (*e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)), that the total destruction of the usefulness and value of Lake Country's property by regulation without compensation would violate its rights to due process and just compensation.[10] The argument that the contours of due process are not exact in this case is no more valid than it was in *Wood v. Strickland*, where the same argument was advanced in dissent, 420 U.S. 308, 329 (1975) (Powell, J. dissenting), and implicitly rejected by this Court.

10. Indeed, the following portion of Justice Holmes's opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), is strikingly apt:

> "The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. *But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.*" (Emphasis added.)

D. The Respondents Are Not Entitled to Review of the Bivens Issue.

In their opposing briefs, respondents TRPA and the individual defendants attempt to attack the Court of Appeals' ruling that Lake Country has stated a claim for damages under the Fifth Amendment within the federal question jurisdiction of the District Court. 28 U.S.C. § 1331. They argue that the Court of Appeals was wrong in applying the reasoning of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to this case.[11] [Brief of Certain Respondents, pp. 16-27; Brief for Repondents James Henry and William Briner, pp. 15-18.] This issue is not fairly comprised within the questions on which Lake Country's petition for certiorari was granted, which deal only with the immunities of the defendants. Respondents filed no cross-petition. Therefore, they are not entitled to argue this issue.

Respondents' contention does not come within the rule that they may argue any matter within the record that would sustain the judgment below. Acceptance of their arguments on the *Bivens* issue would require that judgment to be modified to dismiss the damage claims altogether, rather than remanding them to the District Court for application of the Court of Appeals' rulings on the immunity issues. The effect would not be to affirm the judgment but to enlarge respondents' rights under it. This they cannot do without cross-petitioning. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560, n. 11 (1976); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, n. 2 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970).

11. TRPA also apparently contends that the Court of Appeals affirmed the existence of a *Bivens* claim only against the individual defendants. That is clearly wrong. Since the Court had already erroneously concluded that TRPA was shielded by the Eleventh Amendment from claims of any nature, it naturally did not mention TRPA when subsequently discussing the *Bivens* claim. Nothing, however, indicates that Lake Country's damage claim is limited to the individual defendants.

This case is in exactly the same posture as *Mills v. Electric Auto-Lite Co., supra*. There the District Court had held a proxy statement misleading and applied one test of causation to determine liability. The Court of Appeals agreed that the proxy statement was misleading but reversed and remanded for application of a different test of causation. Certiorari was granted on the question of what test of causation to apply. What this Court said in refusing to consider respondent's argument that the proxy statement was not misleading is equally applicable, *mutatis mutandis*, to this case:

> "Respondents ask this Court to review the conclusions of the lower courts that the proxy statement was misleading in a material respect. Petitioners naturally did not raise this question in their petition for certiorari, and respondents filed no cross-petition. Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment, which remanded the case for proceedings to determine causation, but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances. *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-192 (1937); R. Stern & E. Gressman, Supreme Court Practice 314, 315 (4th ed. 1969)." 396 U.S. at 381, n. 4.

For the same reason, TRPA and the individual defendants should not be heard here to question the Court of Appeals' *Bivens* ruling. As the next sections show, however, if this issue were to be considered, the Court of Appeals was correct in applying *Bivens* to afford Lake Country a damage remedy and, in addition, Lake Country has a damage remedy under 42 U.S.C. § 1983.

E. The Court of Appeals Correctly Held That Lake Country May Recover Damages If It Proves That the Tahoe Regional Planning Agency and Its Officers Deprived Lake Country of Its Property Without Due Process of Law.

1. BIVENS AUTHORIZES LAKE COUNTRY TO SUE THE TAHOE REGIONAL PLANNING AGENCY AND ITS OFFICERS FOR DAMAGES.

The Court of Appeals held that under the principles announced by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* an award of damages is among the remedies that will be available to Lake Country if it proves the due process claim it has stated.[12] *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353, 1363-1364 (9th Cir. 1977) [A.P. 14-16]. That

12. The Court of Appeals held that Lake Country stated a claim for a taking of property without due process in violation of the Fifth and Fourteenth Amendments. It concluded that Lake Country had failed to state a cause of action under the just compensation clause of the Fifth Amendment because "TRPA was given only the power to regulate, not the power to condemn." 566 F.2d at 1358 n. 7 & 1358. [A.P. 5 n. 7 & 4-6] This reasoning denying Lake Country's claim under the just compensation clause is unsound. What triggers the application of the just compensation guarantee is a taking of private property for public use, not the initiation or consummation of condemnation proceedings. *See Jacobs v. United States,* 290 U.S. 13, 16 (1933). The Court of Appeals' approach would make a property owner's right to just compensation depend not on *whether* a taking occurred, but on *how* it was accomplished. This is not the law. *See Bydlon v. United States,* 175 F.Supp. 891, 900 (Ct.Cl. 1959). Nor should it be. An analysis that excludes from the class of takings a complete deprivation of a property interest which is accomplished *ultra vires* governmental authority allows the government to frustrate the purpose of the takings clause by recourse to a meaningless technicality.

Lake Country takes issue with both the finding that TRPA lacks condemnation authority, and the conclusion that as a result Lake Country cannot base its claim on the just compensation clause. These issues were extensively discussed by Lake Country in the briefs it filed below. Since Lake Country does not believe that the issue of the remedy available to Lake Country is properly before this Court, and does not wish to burden this Court with unnecessary briefing, that lengthy discussion is not repeated here. Should this Court decide that the issue of the remedy available to Lake Country is properly before the Court, Lake Country respectfully refers the Court to the briefs below.

decision is consistent with both the letter and the spirit of *Bivens.*[13] If this Court concludes that the respondents are entitled to challenge the Court of Appeals' ruling on this question without filing a cross-petition for certiorari, then the decision below should be affirmed.

Although the Fourth Amendment does not expressly authorize enforcement of its proscriptions by an award of damages, this Court held in *Bivens* that compensable injury to a constitutionally protected interest can be vindicated in a suit for monetary relief. 403 U.S. at 397. Recognizing that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done", 403 U.S. at 396, quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946) (footnote omitted), this Court found the availability of a damage remedy unsurprising. "Historically", it explained, "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395.

These principles apply with equal force to the Fifth Amendment rights that the Lake Country seeks to vindicate in this action. The right not to be deprived of property without due process of law is, as the Court of Appeals concluded just as fundamental as the rights secured by the Fourth Amendment. 566 F.2d at 1363. [A.P. 16] There is no

13. Although this Court has not decided whether *Bivens* makes a damage remedy available to plaintiffs seeking redress for the deprivation of contitutional rights that are not protected by the Fourth Amendment, *see, e.g., Butz v. Economou, supra,* 98 S.Ct. at 2900 n. 8 (1978); *Mt. Healthy School District v. Doyle,* 429 U.S. 274, 277 (1977), many other federal courts have addressed that question. Like the Court of Appeals, the overwhelming majority have decided that it does. See the exhaustive compilation of cases in Lehmann, "*Bivens* and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials," 4 Hast.Const. L.Q. 531, 567-568 n. 229 (1977) and *Davis v. Passman,* 571 F.2d 793, 805, 807-808 n. 6 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting).

reason why Fifth Amendment rights do not deserve equally effective protection. The respondents' attempt to create a hierachy of constitutional rights, in which the due process right asserted by Lake Country is relegated to second-class status, is misguided. Although they concede that "[c]ertainly *some* rights safeguarded by the broad scope of due process are of equal importance with Fourth Amendment freedoms," [Brief of Certain Respondents 26 (emphasis in original)], the respondents suggest that Lake Country's right not to be deprived of its property without due process of law is not among them. This position cannot be justified. If any rights guaranteed by the due process clause of the Fifth Amendment are to be singled out for protection, none is more deserving than the right not to be deprived of property by governmental action without due process of law. This right was recognized long before the Constitution was written.[14] It is explicitly protected by the Constitution.[15] Its importance was reaffirmed by Congress in the Ku

14. 28 Edw. III, ch. 3 reads as follows:

> "No man of what state or condition he be, shall be put out of his lands or tenaments, nor taken, nor imprisoned, or disinherited, nor put to death, without he be brought to answer by due process of the law."

Quoted in E. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 Harv. L. Rev. 366, 368 (1911). *Accord*, Magna Carta ¶¶ 30, 31, & 39 (1215), reprinted in American Bar Foundation, *Sources of Our Liberties* 17 (R. Perry ed. 1959). *See generally* C. McIlwin, "Due Process of Law in the Magna Carta," 14 Colum. L. Rev. 27, 51 (1914); E. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149-185, 365-409 (1928-1929).

15. U.S. Const. amends. V & XIV, § 1. "The fundamental character of the property right was asserted repeatedly on the floor of the Convention of 1787." E. Corwin, "The Basic Doctrine of American Constitutional Law," 12 Mich. L. Rev. 247, 255 (1914). See 1 *Records of the Federal Convention of 1787* 424, 533-534, 541-542 (M. Farrand ed. 1966); 2 *Records of the Federal Convention of 1787* 123 (M. Farrand ed. 1966).

Klux Klan Act of 1871,[16] as well as in the Fourteenth Amendment.[17] In addition, both this Court[18] and some of the most respected legal and political theorists in the Anglo-American tradition[19] have aptly described the right to property as the cornerstone of civilized society.

Damages are just as appropriate a remedy in a cause of action to protect Fifth Amendment rights as in one to protect Fourth Amendment rights. Compensatory relief is traditional remedy for an unreasonable government inter-

16. As this court stated in *Lynch v. Household Finance Corp.*, 405 U.S. 539 (1972),

> "[t]he rights that Congress sought to protect in the Act of 1871 were described by the chairman of the House Select Committee that drafted the legislation as 'the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.' [citation omitted] That the protection of property as well as personal rights was intended is also confirmed by President Grant's message to Congress urging passage of the legislation, and by the remarks of many members of Congress during the legislative debates."

405 U.S. at 545-46 (footnotes omitted).

17. See *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from the discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property.").

18. *E.g., Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795) (emphasis in original). There this court stated:

> "The right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man. Men have a sense of property; property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labour and industry. The preservation of property, then, is the primary object of the social compact. . . ."

2 U.S. (2 Dall.) at 310.

19. J. Locke, *Of Civil Governmeni* 82-85 (1924); 1 W. Blackstone, *Commentaries** 138-140; E. Corwin, "The Basic Doctrine of American Constitutional Law," 12 Mich. L. Rev. 247, 255 (1914).

ference with property rights. Long before *Bivens,* this Court established that the Fifth Amendment can be used as a sword as well as a shield. *See* Dellinger, "Of Rights and Remedies: The Constitution As A Sword," 85 Harv. L. Rev. 1532 (1972). In *Jacobs v. United States,* 290 U.S. 13, 16 (1933), for example, it held that the Constitution gives one whose property has been taken for public use the right to sue for damages in order to insure that the Fifth Amendment guarantee of just compensation is respected. *Accord, United States v. Klamath and Moadoc Tribes of Indians,* 304 U.S. 119, 123 (1938); *cf.* "Developments in the Law—Zoning", 91 Harv. L. Rev. 1427, 1500 (1978) ("Traditionally, compensation awards have consisted of cash transfers.")

Nor are any of the special circumstances mentioned in *Bivens* that might militate against the availability of a damage remedy present in this case. This case does not confront this Court with "a question of 'federal fiscal policy'." 403 U.S. at 396. Section 5 of Congress' consent to the Compact expressly provides: "[n]othing contained in this Act or in the Compact consented to shall in any way affect the . . . obligations, of the United States . . . ." [A.P. 79]. Nor does Lake Country ask that liability be imposed on a congressional employee merely for exceeding authority delegated to him by the Congress.[20] 403 U.S. at 396-397. Instead, Lake Country alleges that an explicit constitutional prohibition has been violated. Moreover, as in *Bivens*, there is no "explicit congressional declaration that persons injured [in the manner that the petitioners were] may not recover damages . . . but must instead be remitted to another rem-

20. The individual respondents are neither congressional employees, nor in any way comparable to Congressmen. See discussion at page 6, *supra*, and in the Brief for the Petitioners 35-38.

edy, equally effective in the view of Congress." 403 U.S. at 397.[21]

The decision in *States Marine Lines, Inc. v. Shultz,* 498 F.2d 1146 (4th Cir. 1974), which involved circumstances similar to those presented here, attests to the soundness of the conclusion that *Bivens* makes a damage remedy available to Lake Country. In *Shultz*, the Bureau of Customs had seized a portion of the plaintiff's cargo from a freighter. After protracted negotiations with the Bureau failed to obtain the release of the confiscated cargo, the plaintiff sought an order directing the Bureau either to institute forfeiture proceedings or to release the cargo. The plaintiff also requested an award of incidental and consequential damages to compensate it for the losses it had suffered as a result of the Bureau's detention of the cargo. The Bureau released the cargo shortly after the suit was filed, but the plaintiff pressed on with its claim for damages. The Fourth Circuit Court of Appeals held that the plaintiff had stated a claim under the due process clause of the Fifth Amendment. 498 F.2d at 1157. Stressing the fact that because the seizure had already occurred, "other remedies such as

21. The respondents' reliance on *Davis v. Passman,* 571 F.2d 793 (5th Cir. 1978) (en banc), one of the few decisions declining to afford *Bivens'* protection to constitutional but non-Fourth Amendment rights, is misplaced. The issue presented in *Davis* was whether a former congressional aide had a cause of action for damages under the due process clause of the Fifth Amendment against a Congressman who had fired her solely on the basis of her sex. Relying heavily on what it regarded as the clearly discernible will of Congress to deny a damage remedy, the Court concluded that she did not. *See* 571 F.2d at 797-798 & 800. This consideration, which was dispositive in *Davis,* is not present here.

Indeed, one of the purposes Congress sought to achieve by enacting 42 U.S.C. § 1983 was to insure that a damage remedy would be available to persons injured by takings of their property. *See Monell v. New York Department of Social Services,* — U.S. —, 98 S.Ct. 2016, 2034 (1978).

injunctive relief or relief in the nature of mandamus are no longer viable alternatives", the Court also held that assuming that the allegations of the complaint were true, *Bivens* would entitle the plaintiff to an award of damages. *Id.*[22] The same reasoning gives Lake Country a damage remedy here.

Finally a rule that damages are not available where private property is taken without due process of law would encourage irresponsible regulation of land use and the violation of property owners' constitutional rights. It would remove proper consideration of the costs of illegal land use regulation from the decision-making process. As one commentator has explained,

> "As long as we can restrict A's land without any cost to the rest of us, we are not likely to consider very seriously the consequences of the restriction; they fall primarily on A. But if we know that the restriction may induce A to compel the government to buy his land [or to sue for damages], then as administrators or as citizens we must ask ourselves whether the benefit to be obtained from the restriction is worth the cost. . . ."

Dunham, "From Rural Enclosure to Re-Enclosure of Urban Land," 35 N.Y.U.L.Rev. 1238, 1253-1254 (1960).

Vindicating rights violated by an illegal land use regulation is a long, difficult, and expensive process. Few property owners can afford to struggle for years against a gov-

22. The same principle applies to a taking of property in the land use regulation context. *See Lomarch Corp. v. Mayor and Common Council of City of Inglewood*, 51 N.J. 108, 237 A.2d 881 (1968); *Washington Market Enterprise, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Keystone Associates v. State*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (1972), *aff'd* 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973); *City of Miami v. Romer*, 73 So.2d 285 (Fla. 1954).

ernmental opponent that is determined to "lease" their land for as long as possible without paying for it. It is poor policy to allow governments to enact illegal regulatory measures in order to "buy time" without paying for it. A damage remedy against government agencies and their officers to redress violations of due process rights provides a needed element of deterrence. Otherwise they would be free to disregard the limits of their authority and the constitutional rights of property owners, confident that at worst the courts would merely prune their regulations back to constitutional bounds, if their actions were tested at all.

Providing a damage remedy, on the other hand, affords regulatory agencies an incentive to respect the constitutional rights of property owners as part of the process of formulating and implementing their regulations. That not only is consonant with the fundamental nature of those rights but also insures that they will be taken into account at a time when the regulatory interest can be harmonized with them before substantial damage has been done.

2. NOTHING SUGGESTS THAT LAKE COUNTRY'S FIFTH AMENDMENT RIGHTS ARE NOT ENTITLED TO BIVENS' PROTECTION.

The respondents attack the Court of Appeals' ruling that *Bivens* gives Lake Country a damage remedy on a variety of grounds. Each challenge lacks merit.

The respondents contend that the language of the *Bivens* opinion demonstrates that *Bivens* shields only "personal" as opposed to "property" interests from unconstitutional interference. Confidently placing the Fifth Amendment rights asserted by Lake Country in the latter, supposedly disfavored category, the respondents conclude that they are not worthy of *Bivens* protection. [Brief of Certain Respondents 17-19] But as this Court explained in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the dis-

tinction which the respondents attempt to draw between personal interests and the interests of persons in their property is specious.

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal right" . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized."

405 U.S. at 552. Thus, the argument advanced by the respondents rests on a premise that has already been expressly rejected by this Court.[23]

The respondents also argue that *Bivens* does not apply to this case because Lake Country has an adequate remedy in equity. [Brief of Certain Respondents 19-21] But their contention that "*Bivens*' extension of damages to remedy

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23. The respondents' carefully edited excerpts from the language of *Bivens* and *Butz* do not suggest that the position taken by this Court in *Lynch* was a temporary aberration. This Court usually describes its holding in *Bivens* in far broader terms than the respondents. *Bivens* itself characterizes the interests it protected as "constitutional", "Fourth Amendment", or even "federally protected", rather than merely "personal" in nature. *E.g.*, 403 U.S. at 392, 397 & 408. Similarly, *Butz* described *Bivens* as holding that "compensable injury to a constitutionally protected interest could be vindicated by a suit for damages." 98 S.Ct. at 2900. *See also* 98 S.Ct. at 2910.

The respondents' effort to breathe life into the alleged distinction between personal and property rights by citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) and *Dandridge v. Williams*, 397 U.S. 471 (1970), fares no better. Both decisions suggest that rights specifically protected by the first ten amendments merit preferential treatment, *see* 304 U.S. at 152 n. 4 & 397 U.S. at 484, not that personal rights are preferred to property rights.

a constitutional deprivation depends on the inadequacy of alternative remedies", stands on its head the principle that equitable relief is available only when there is no adequate remedy at law. Certainly this is not what this court intended to do in *Bivens*. *See Terrace v. Thompson*, 263 U.S. 197, 214 (1923). Neither the majority nor Justice Harlan intimated that damages should be a remedy of last resort for victims of constitutional deprivations. Instead this Court repeated and applied in the constitutional context the principle that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, 403 U.S. at 396, quoting *Bell v. Hood, supra*, 327 U.S. at 684. *Bivens* contemplates a careful and particularized inquiry into the question of what remedy is most appropriate and most likely to be effective under the circumstances, not a rigid, *a priori* rule that one form of relief is inherently preferable to all others. *See* 403 U.S. at 396-397, 408 n. 8, & 409 n. 9; Monaghan, "Foreword: Constitutional Common Law," 89 Harv.L. Rev. 1, 24 n. 125 (1975).

Moreover, the respondents' contention that in contrast to the situation in *Bivens*, "damages are wholly unnecessary to the vindication of petitioners' allegedly infringed rights" [Brief of Certain Respondents 20], is simply wrong. Lake Country has been deprived of the opportunity to use and enjoy its property ever since the respondents took it in 1972. [A. 9-10, ¶¶ 19-22] Declaratory and injunctive relief may be available to prevent TRPA from imposing illegal constraints in the future, but those remedies will not make petitioners whole. Like Bivens, Lake Country has suffered harm because of a violation of its constitutional rights. "Injunctive or declaratory relief is useless to a person

who has already been injured." *Butz v. Economou, supra,* 98 S.Ct. at 2910 (1978). The possibility of prevention has been overtaken and foreclosed by events. An award of damages is necessary to make Lake Country whole.

The respondents' reliance on *Cort v. Ash,* 422 U.S. 66 (1975), where this Court set forth the factors to be considered in determining whether to infer a private cause of action for damages from a federal statute, is equally unavailing. [Brief of Certain Respondents 21-24] *Ash* has nothing to do with this case. It addressed the question whether a private damage remedy was implicit in a statute, not in the Constitution. Constitutional interpretation is radically different from ordinary statutory construction. Greater latitude for change and growth is required in the constitutional sphere. *See Missouri v. Holland,* 252 U.S. 416, 433 (1920) (Holmes, J.); E. Levi, *An Introduction to Legal Reasoning* 59 (1949). Moreover, as Justice Harlan stated in *Bivens,* "the judiciary has a particular responsibility to assure the vindication of constitutional interests," especially those protected by the Bill of Rights. 403 U.S. at 407 (Harlan, J., concurring).

Not only is *Ash* inapplicable, but the respondents misapply the rules that *Ash* says must be followed in a different context. The respondents argue that since the behavior which Lake Country challenges is the regulation of land use, and since this is a matter of primarily local concern, *Ash* requires that a damage remedy not be made available to them. This is precisely the kind of argument that this Court rejected in *Bivens.* 403 U.S. at 394-395. The federal constitutional limits on federal and state governmental interference with private rights in property hardly concern issues "traditionally relegated to state law, in an area basically the concern of the states." [Brief of

Certain Respondents 22, quoting *Cort v. Ash, supra* 422 U.S. at 78] On the contrary, the creation and regulation of causes of action to safeguard rights guaranteed by the constitution is not historically the province of state governments. *See* C. Pritchett, *The American Constitution* 508-511 (3rd ed. 1977). "It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states." H. Friendly, *Federal Jurisdiction: A General View* 90 (1973).

The respondents' assertion that Lake Country should be denied a damage remedy because it lacks a "clearly articulated federal right" also falls wide of the mark. [Brief of Certain Respondents 22-24, quoting *Cort v. Ash, supra,* 422 U.S. at 82] Read in context, the term "clear" in the phrase quoted by the respondents means "definitely existing" rather than "easily defined." See 422 U.S. at 78. This Court's difficulty in developing a single, straightforward test for determining when property has been taken does not mean that it is uncertain whether the due process clause of the Fifth Amendment shields Lake Country's property from unreasonable government interference.[24] See discussion at pages 12-13, *supra.* If this were the test, the Fourth Amendment would not have qualified for *Bivens'* protection either. This Court has found it no easier to create a definitive standard for determining whether a search or seizure is unreasonable than it has for determining whether a government interference with a property right is unreasonable. *Compare Penn Central Transportation Co. v. City of New York, supra,* 98 S. Ct. 2646, 2659 (1978) *with Go-Bart Co. v. United States,* 282 U.S. 344, 357 (1931).

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24. Indeed, both the District Court and the Court of Appeals had no problem finding that Lake Country's complaint had stated a claim under the due process clause. [A.P. 5 & 60]

The respondents also contend that "[s]ound policy considerations" militate against the availability of a damage remedy in this context because of the "chilling effect" that it would have on governmental officials who may worry about being subjected to personal liability for inadvertent errors in interpreting consititutional law. [Brief of Certain Respondents 20-21].[25] One answer to this argument is that this concern is properly the province of the law of immunity, which would protect mere error. *See* pages 10-13, *supra*. Another answer is that the argument has nothing to do with this case. Lake Country has alleged that the individual respondents did not "guess wrong", but rather that they intentionally and arbitrarily did what they knew and should have known they had no authority to do.[26] Because of the procedural posture of this case, these allegations must be taken as true. The sound policy invoked by the respondents does not militate against discouraging public officials from engaging in willful wrongdoing. Where, as here, misbehavior is intentional, any "chilling effect" is salutary.

F. Lake Country Has a Damage Remedy Under 42 U.S.C. § 1983.

The Court of Appeals reached the question whether Lake Country has a damage remedy under *Bivens* only because it held that Lake Country could not obtain damages under 42 U.S.C. § 1983. The *Bivens* issue is not properly before this Court. But if it is considered, then the Court of Ap-

25. The respondents' suggestion that the "chilling effect" concept, which was developed in an attempt to limit government interference with constitutional rights, *see Shelton v. Tucker*, 364 U.S. 479, 487 (1960), quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), should operate here to increase the amount of that interference, is certainly a novel one.

26. See discussion at page 11 & n. 7, *supra*.

peals' disposition of Lake Country's section 1983 claim must also be reviewed, not merely to provide the context for consideration of the *Bivens* issue, but also because Lake Country would be entitled to raise section 1983 as a ground for sustaining the judgment of the Court of Appeals which granted it a damage remedy.

Section 1983 provides a damage remedy for the deprivation of constitutional rights by any "person" acting under color of state law. There is no question that the rights which Lake Country claims were violated are constitutional rights. There is also no question that the individual defendants are "persons" for the purposes of section 1983. In addition, this Court's ruling in *Monell v. New York Department of Social Services*, — U.S. —, 98 S. Ct. 2018 (1978) establishes that TRPA, as a political subdivision of California and Nevada, is also a "person" under section 1983. Finally, contrary to the conclusion of the Court of Appeals, the Compact under color of which the respondents acted is not just federal law, but state law as well.[27] Therefore, every requirement for a section 1983 claim is satisfied in this case. It follows that section 1983 would provide a basis for affirming the Court of Appeals' judgment that Lake Country has a damage remedy against these defendants even assuming that its ruling on the *Bivens* issue were wrong.

Section 1983 provides a damage remedy for the taking of Lake Country's property if it was accomplished under color of state law. (Indeed, one reason Congress enacted section 1983 was to provide a damage remedy for such taking. *Monell v. Department of Social Services of the City of New York*, *supra*, 98 S.Ct. at 2034 (1978).) *Bivens* pro-

27. This point is discussed in Brief for Petitioners at 30-31.

vides a similar remedy if the taking was accomplished under the authority of federal law. Thus, regardless of whether TRPA's actions are considered to be under color of state law or under the authority of federal law, Lake Country has a damage remedy. As TRPA and the individual defendants would have it, however, Lake Country has a damage remedy under neither section 1983 nor *Bivens*, even though their actions violated both the Fifth and Fourteenth Amendments and were done under the authority of both state law enacting the Compact and federal law giving it Congress' consent. That result is neither sensible nor just, and it must be rejected.

III. CONCLUSION

For the reasons stated above and in the Brief for the Petitioners, it is respectfully submitted that the judgment of the Court of Appeals should be reversed as to the issues raised by the questions presented and the case remanded for further proceedings.

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Respectfully submitted,

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